

Fee Waiver Request

Records in Regard to EPA's Decision to Halt the Proposed Rulemaking of Adding Natural Gas Processing Facilities to the Toxic Release Inventory

Pursuant to FOIA, 5 U.S.C. § 552(a)(4)(A)(iii), and EPA's implementing regulations, 40 C.F.R. § 2.107(l), the Environmental Integrity Project (EIP) requests that all charges (e.g., search, review, and duplication fees) incurred in connection with this request be waived. The legislative history of FOIA indicates that the fee waiver provision "is to be liberally construed in favor of waivers for noncommercial requesters." *Forest Guardians v. U.S. Dep't of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005) (internal quotations and citations omitted). EIP is a national nonprofit organization dedicated to the integrity and enforcement of our environmental laws. EIP's work combines research, reporting, and media outreach to spotlight illegal pollution and encourage federal and state agencies to take enforcement action to stop the practices leading to such pollution.

As discussed below, EIP satisfies the two-pronged test for a fee waiver established in FOIA and outlined in EPA's implementing regulations because: (i) "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government," and (ii) disclosure of the information "is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1).

I. Disclosure of the requested information is in the public interest because it will contribute significantly to public understanding of the operations or activities of government.

EIP qualifies for the fee waiver because the requested information will "contribute significantly to public understanding of the operations or activities of the government." 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 40 C.F.R. § 2.107(l)(1), (2).

A. The subject of the request concerns the operations and activities of the government.

EIP seeks records related to EPA's decision to list the rulemaking adding natural gas processing facilities to the Toxic Release Inventory (TRI) as an "inactive action," separate from the Unified Agenda of Regulatory and Deregulatory Actions. The Emergency Planning and Community Right-to-Know Act (EPCRA) expressly requires industrial sectors to report their toxic release, commonly known as Toxic Release Inventory. Under EPCRA, Congress also grants EPA the discretion to adjust the scope of sector covered by TRI. Therefore, EPA's decision to pause adding natural gas processing facilities to the TRI relates to its role as a regulator, investigator, and enforcer under the EPCRA, and we believe that these records on how EPA arrived at its decision necessarily involve the operations and activities of the government. 40 C.F.R. § 2.107(l)(2)(ii).

B. The disclosure is likely to contribute significantly to a public understanding of the government's operations or activities.

The guiding test to determine whether or not the disclosure of the requested information will contribute significantly to public understanding of the government's operations or activities is "whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject." *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 815 (2d Cir. 1994). After reviewing the information provided, EIP intends to use its resources and expertise to inform and educate other non-profit advocacy organizations and the public as to the evolving regulation of natural gas processing facilities and the scope of facilities covered under the TRI.

II. Obtaining the information is of no commercial interest to EIP

The second element of the fee waiver analysis concerns the requester's "commercial interest" in the information requested. There are two relevant inquiries to determine whether the information requested is "primarily in the commercial interest of the requester" and a fee waiver is appropriate if either inquiry is satisfied. 40 C.F.R. § 2.107(l)(3). The first inquiry is whether the requester has a "commercial interest that would be furthered by disclosure." 40 C.F.R. § 2.107(l)(3)(i). Here, as a 501(c)(3) non-profit organization, EIP has no commercial, trade, or profit interest in the material requested. EIP will not be paid for or receive other commercial benefits from the publication or dissemination of the information requested.

The second inquiry concerns the requester's primary interest in the disclosure. *See* 40 C.F.R. § 2.107(l)(3)(ii). The requested materials will allow for a more thorough analysis of EPA's decision, and any need for greater monitoring, regulation, or enforcement. Even assuming *arguendo* that EIP does have a commercial interest in the requested materials, a complete fee waiver would be appropriate under this second inquiry because EIP's primary interest in the materials is non-commercial, i.e., to inform the public about the operations and activities of the government. Therefore, the "disclosure of the information . . . is not primarily in the commercial interest of" EIP, and a fee waiver is warranted. 5 U.S.C. § 552(a)(4)(A)(iii).

Conclusion

In light of the foregoing, the requested records bear directly on identifiable operations and activities of EPA, will contribute significantly to a broad public understanding of important matters relating to government functioning and compliance with federal laws, and will not serve any commercial interest on the part of EIP. Therefore, a fee waiver is appropriate.